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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 430

THE FLYING TIGER LINE, INC.,
Petitioner,

—against—

PHILIPPINE AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

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October 23, 1958.

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Respondent, Philippine Air Lines, Inc. (hereinafter called "Philippine Air Lines"), opposes the petition of petitioner, The Flying Tiger Line, Inc. (hereinafter called "Flying Tiger"), for a writ of certiorari. The judgment below against Flying Tiger in favor of Philippine Air Lines is clearly correct, presents no novel, important or fundamental question of federal law, is not in conflict with any admonition of this Court and involves no conflict of decisions.

QUESTION PRESENTED

The only question presented is the liability of Flying Tiger to Philippine Air Lines for the conceded loss by Flying Tiger of a shipment made by plaintiff, H. Orlove Company (hereinafter called "Orlove"), which loss was

caused by Flying Tiger's negligence and failure to exercise due care and for which loss Orlove has been awarded a judgment against Philippine Air Lines.

STATEMENT

This action was brought by Orlove against Philippine Air Lines and Flying Tiger. Prior to the trial of the action, Orlove discontinued as against Flying Tiger. However, Flying Tiger remained in the case for the purpose of the claim over by Philippine Air Lines. In the District Court, Orlove recovered judgment against Philippine Air Lines in the sum of $33,245.75 and Philippine Air Lines recovered judgment over against Flying Tiger in the same amount, $33,245.75.

In 1949, Philippine Air Lines was operating an air line for the transportation of cargo on routes between San Francisco, California, and Hong Kong. It did not operate between points within the United States (PAL 4a*). Flying Tiger was operating its air line, for the transportation of cargo only, between certain cities of the United States, including New York and San Francisco (FT 85a-86a**).

On June 10, 1949, the date on which Orlove delivered his package to Mercury General Trucking Company (hereinafter called "Mercury General"), Philippine Air Lines had on file with the Civil Aeronautics Board, pursuant to the provisions of the Civil Aeronautics Act of 1938 [49 U. S. C. A. § 483(a)], an International Air Cargo Tariff (PAL Exh. D; PAL 15a) issued June 19, 1948, setting forth all of its rates, rules and regulations. Similarly, Flying Tiger had on file with the Civil Aeronautics Board its tariff, setting forth its rates, rules and regulations (FT

*These references are to pages in the Philippine Air Lines Appendix in the Court of Appeals.

**These references are to pages in the Flying Tiger Appendix in the Court of Appeals.

Exh. G; FT 142a). In addition, there was also on file with the Civil Aeronautics Board on June 10, 1949, an Interline Cargo Traffic Agreement between Philippine Air Lines and Flying Tiger dated August 25, 1948 (PAL Exh. E; FT 124a). The purpose of this agreement was to establish the procedure and method of handling both export and import shipments and the shipping documents covering such shipments where the two parties were to act as connecting carriers for any such shipments.

The shipment in question was an export shipment, one of many similar shipments made by Orlove (Op. 19), and was covered by the Interline Agreement (PAL 29a).

The evidence clearly supported the District Court's findings* that on June 10, 1949 (Friday), at approximately 5:00 P.M., Orlove delivered a wooden box to the dispatcher and receiving clerk at the office of Mercury General, Flying Tiger's agent for the receipt of freight (FT 26a, 146a, 148a, 153a). The box was clearly marked for delivery to D. E. Levy, 10 Ice House Street, Hong Kong (FT 27a, 45a). Edward Steenbeke, the Mercury General employee who received the shipment, asked Orlove for certain information and filled out a form designated "Airbill Request & Shipping Order No. 210107" (PAL Exh. B; FT 122a), which Orlove read and signed (FT 45a, 60a, 151a, 152a). This document contained no declaration of the value of the shipment. There was a conflict in the testimony as to whether Orlove was asked to declare a value (FT 45a, 151a, 152a). However, the District Court found he was not asked to do so (PAL 26a). In any event, the Airbill Request & Shipping Order merely described the shipment as "1 Box" with a weight of 493½ pounds consigned by "H. Orlove Co., 233 W. 26, N. Y. C." to "Phil Air Line San Fran Calif." (PAL Exh. B; FT 122a).

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*All of the District Court's findings were affirmed by the Court of Appeals.

There is no dispute as to what then occurred. The box was delivered by Mercury General to Flying Tiger at Newark Airport at about 7:00 o'clock in the evening of June 10, 1949, for delivery to Philippine Air Lines in San Francisco (FT 153a). It was admitted by Flying Tiger that it never delivered the box to Philippine Air Lines (PAL 4a). The District Court and the Court of Appeals found that Flying Tiger lost the shipment during the flight from Newark to Burbank and that the loss was due to Flying Tiger's negligence and failure to exercise due care (Op. 21*; D. C. Op. 27**; PAL 30a).

The box was clearly marked for shipment to Mr. Leo in Hong Kong and Flying Tiger, through its agent, Mercury General, was clearly on notice that the shipment was an export shipment (Op. 20; D. C. Op. 33). Flying Tiger was bound under the terms of its Interline Agreement with Philippine Air Lines to handle the shipment as required under that agreement. Specifically, the District Court found that Flying Tiger should have requested from Orlove a copy of his Shipper's Letter of Instructions and a copy of his customs declaration, both of which would have disclosed the value of the shipment. Failing to do so, Flying Tiger breached its agreement with Philippine Air Lines, assumed the risk of any damages resulting from such breach, and was liable over to Philippine Air Lines for the loss (PAL 29a-30a).

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*These references are to the Court of Appeals opinion and pages of Appendix I to the Flying Tiger petition for a writ of certiorari.

**These references are to the District Court opinion and pages of Appendix II to the Flying Tiger petition for a writ of certiorari.

ARGUMENT

For the purposes of this brief it will be assumed that the judgment against Philippine Air Lines in favor of Orlove is valid and correct.*

A. The District Court and the Court of Appeals Found That the Loss of Orlove's Shipment Was Due To Flying Tiger's Negligence and Failure To Exercise Due Care. Irrespective of The Interline Agreement Between Philippine Air Lines and Flying Tiger, Any Liability of Philippine Air Lines to Orlove Must Be Borne By Flying Tiger.

Flying Tiger, acting as a connecting carrier, undertook to deliver Orlove's shipment safely to Philippine Air Lines in California. Flying Tiger concededly lost Orlove's shipment and the District Court found the loss resulted from Flying Tiger's negligence and failure to exercise due care. It is well settled that where two or more carriers undertake to act as connecting carriers to transport goods over their respective lines, whether the transportation be by air, land or sea, each carrier is bound to carry the shipment safely over its own line and its liability is limited to its portion of the route and to its own negligence. *Oregon-Washington Co.* v. *McGinn*, 258 U. S. 409 (1922); *Goliger Trading Co.* v. *Chicago & N. W. Ry. Co.*, 184 F. 2d 876 (7 Cir., 1950).

Thus, in *Oregon-Washington Co.* v. *McGinn*, 258 U. S. 409 (1922), this Court said (at p. 413):

> "The settled federal rule is that, in the absence of statute or special contract, each connecting

*Philippine Air Lines has filed a petition for a writ of certiorari to review that portion of the judgment in favor of Orlove and against Philippine Air Lines.

carrier on a through route is bound only to safely carry over its own line and safely deliver to the next connecting carrier, *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 102, 107; *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318, 324, and the liability of a connecting carrier for the safety of property delivered to it for transportation, commences when it is received and is discharged by its delivery to and acceptance by a succeeding carrier, or its authorized agent. *Pratt* v. *Railway Co.*, 95 U. S. 43."

Flying Tiger's liability herein commenced when its agent Mercury General accepted Orlove's shipment. That shipment was never delivered to Philippine Air Lines, the succeeding carrier, and therefore Flying Tiger's liability never ceased. The shipment having been lost through Flying Tiger's negligence (Op. 24), any liability to Orlove must be borne by Flying Tiger.

B. The Decision of the Court of Appeals Does Not Conflict with the Admonition of This Court Nor Does It Conflict with Applicable Decisions of This Court or the Courts of Appeals.

The decision of the Court of Appeals rests upon the negligence of Flying Tiger and its breach of the Interline Agreement of August 25, 1948 (Op. 24). It does not conflict with any fundamental rules governing the relations between carriers.

Interline agreements, such as the one between Philippine Air Lines and Flying Tiger, are commonplace. The purpose of such agreements is to cover situations where the parties will act as connecting carriers for each other. As the Court said in *Rosario Min. Co.* v. *Riddle Airlines*, 3 App. Div. 2d 457 (1st Dep't, 1957) (at p. 461):

> "Such an arrangement contemplates an agreement wherein the carriers agree to act as connecting carriers, each for the other. This arrangement permits a carrier to accept for transportation shipments that are beyond the limits provided in its certificate of authority."

The Interline Agreement between Philippine Air Lines and Flying Tiger was filed with the Civil Aeronautics Board, as required by law (49 U. S. C. A. § 492).

The Interline Agreement covered both import and export shipments to be handled by Philippine Air Lines and Flying Tiger as connecting carriers. Article IV (FT 130a) provided for the physical handling of such shipments. On each export shipment [Article IV(a)] Flying Tiger agreed to transfer the shipment from its airport facility (Newark) to the airport office designated by Philippine Air Lines "at its nearest airport of Export" (San Francisco) for clearance of the shipment through United States Customs and transportation by Philippine Air Lines to the shipment's foreign destination (Hong Kong).

The Interline Agreement also covered the handling of shipping documents on such export shipments. By Article II(a) (FT 127a), Flying Tiger agreed to obtain from the consignor of each export shipment the following export documents:

> 1. A United States Shipper's Export Declaration, in triplicate, prepared and signed by or for the shipper;
>
> 2. A Shipper's or Manufacturer's Commercial Invoice, in triplicate, prepared and signed by or for the shipper; and
>
> 3. Any other documents when tendered by shippers with such shipments.

By Article II(b) (FT 127a), Flying Tiger was authorized to issue Philippine Air Lines' non-negotiable

international airwaybills on such export shipments, as agent for Philippine Air Lines, and in accordance with special instructions for the issuance of such airwaybills. This was not done in the case of the shipment in question.

The uncontradicted evidence revealed that Orlove delivered his shipment to the office of Flying Tiger's agent, Mercury General, and that the box was plainly marked for delivery to Mr. Levy in Hong Kong. Although Flying Tiger was thus on notice that the shipment was for export, it failed to obtain the Shipper's Export Declaration (Orlove Exh. 3; Orlove 5p)* and the Shipper's Commercial Invoice (Orlove Exh. 2; Orlove 4p), either of which would have shown the declared value at least for export.

The shipment was clearly for export and, as the District Court rightly held (Op. D. C. 27; PAL 24a):

> "* * * inadvertently and negligently the man at the Mercury depot proceeded to handle this matter document-wise as a domestic transaction instead of an export transaction."

The Court of Appeals affirming said (Op. 20-1):

> "While the address on the package thus indicated that it was for export, the clerk at Mercury made no effort to obtain copies of the Shipper's Letter of Instructions or the invoices and export declarations from the plaintiff, although under the Interline Agreement FTL had agreed with PAL to do so in the case of any shipment for export. These documents, of course, would have disclosed the declared value of the shipment."

Flying Tiger did not issue a Philippine Air Lines airwaybill, as it was authorized to do under Article II(b) and it was therefore required under Article II(c) to obtain

*These references are to pages in the Orlove Appendix in the Court of Appeals.

from Orlove the Shipper's Letter of Instructions. However, Flying Tiger failed to obtain the Shipper's Letter of Instructions just as it failed to obtain the other documents. If the Shipper's Letter of Instructions (Orlove Exh. 1; PAL 11a) had been obtained by Flying Tiger from Orlove, as required by the Interline Agreement, it would have shown a declared value both for carriage and for customs. Flying Tiger, however, failed to obtain any of these documents from Orlove, with the result that Orlove mailed the documents to Philippine Air Lines and they were not received by the latter until Monday, June 13, 1949, after the loss of the shipment. The District Court therefore held, quite correctly, that Flying Tiger "failed to perform its own express duty in that regard * * *" (Op. D. C. 33; PAL 38a).

Article VI(a) of the Interline Agreement (PAL Exh. E; FT 132a) provides that where Flying Tiger does not issue the Philippine Air Lines airwaybill as it is authorized to do under Article II(b), Flying Tiger is then bound to tender the shipment to Philippine Air Lines with Flying Tiger's airbill, which airbill shall comply with the following:

> 1. The airbill shall be endorsed with the statement that liability is subject to the rules relating to liability established by the Warsaw Convention and shall be made out in accordance with the provisions of Article 8 of that Convention;
>
> 2. The export consignee will be shown as the actual consignee at foreign destination in care of Philippine Air Lines at the latter's airport of export; and
>
> 3. It shall be endorsed "For Export—Transportation Tax not applicable."

The Flying Tiger airbill (PAL Exh. F; PAL 31a) failed in all three respects to comply with the Interline

Agreement. The airbill failed (1) to make any reference to the Warsaw Convention, (2) to show the actual consignee at foreign destination, showing the consignee only as Philippine Air Lines, San Francisco, California, and (3) to state that the shipment was for export and that transportation tax was not applicable. In all three specific items the Flying Tiger airbill was faulty and failed to comply with the express provisions of the Interline Agreement.

By Article VII of the Interline Agreement the parties agreed to accept both import and export shipments subject to certain agreed conditions. It was agreed [Article VII(a)] that Flying Tiger's liability should be only that stated on its airbill and in its tariff and that with respect to an export shipment Flying Tiger's liability should be deemed to have ceased upon delivery of the shipment to Philippine Air Lines. It was further agreed [Article VII(b)] that Philippine Air Lines' liability should be only that stated on its airwaybill and in its tariff and should apply only during Philippine Air Lines' legal possession of the shipment.

Since it has been conceded that Flying Tiger never delivered the shipment to Philippine Air Lines, Flying Tiger's liability cannot be deemed to have ceased. The meaning and purpose of Article VII is perfectly clear. The intention of the parties was to place the liability, if any, for loss of or damage to a shipment upon the carrier which had actual possession of the shipment at the time of loss or damage. The shipment having been lost while in the possession of Flying Tiger and the loss having been due to Flying Tiger's negligence and failure to exercise due care, there can be no question but that, as the parties agreed, the damages resulting from such loss must be borne by Flying Tiger.

The parties stipulated in the Interline Agreement how export shipments were to be handled and agreed upon the

procedure to be followed in handling the documents to accompany the shipments. Flying Tiger plainly breached the Interline Agreement and became liable for the loss as a result.

Quite aside from any right of indemnity "in the area of contractual indemnity", a further right of indemnity in favor of Philippine Air Lines arises by operation of law as a result of Flying Tiger's conduct herein. Therefore the Court of Appeals correctly stated (Op. 24) that this Court's admonition in *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, 569 (1958), with respect to the theories of primary and secondary negligence is inapplicable here.

Flying Tiger through its own negligence and failure to exercise due care lost Orlove's shipment. Philippine Air Lines, which was directly responsible to Orlove for such loss, is clearly entitled to be indemnified by Flying Tiger for such loss. To hold otherwise would be completely contrary to established decisions of this Court and the Courts of Appeals.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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